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No. 93-644

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief *amicus curiae*. The written consent of all parties has been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of the petitioners.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's govern-

ing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The issue presented in this case is extremely important to the nationwide constituency which EEAC represents. The courts below concluded that Oregon's state constitution did not violate due process by prohibiting judicial review of jury awards of compensatory and punitive damages verdicts for excessiveness. Employers in Oregon and elsewhere are extremely concerned that individual juries with no experience in employment cases could have a field day awarding large punitive damage awards without appropriate standards to guide them and without any meaningful post-trial review to evaluate the appropriateness of the jury's award.

As employers, all of EEAC's members, and the constituents of its trade association members, are subject to claims for compensatory and punitive damages under a variety of federal and state laws and common law causes of action, including 42 U.S.C. § 1981, many state fair employment practices laws, and most state law tort actions arising out of the employment relationship. In many jurisdictions there are no caps on damages, although appellate review of jury awards for excessiveness is available. EEAC's members also are potential targets for jury trials for compensatory and punitive damages under the Civil Rights Act of 1991 (P.L. 102-166 (1991)), which added these damages to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. Although the '91 Act capped these damages for large employers at $300,000 for each claimant, legislation has been introduced in Congress to lift the cap altogether.

Because of its concern that this Court establish meaningful standards for punitive damages and require post-trial review for excessiveness of a jury's punitive damages award, EEAC filed an *amicus curiae* brief in *TXO Prod. Co. v. Alliance Resources Co.*, 113 S. Ct. 2711 (1993), and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Since its founding in 1976, EEAC, acting on its interest in issues involving damage awards under the nation's labor and employment laws, has participated as *amicus curiae* in over 330 cases.[1]

EEAC seeks to assist the Court in this case by highlighting the impact its decision here may have on the field of employment litigation. Accordingly, this brief brings relevant matters to the attention of this Court that have not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Karl Oberg was injured when his Honda three-wheeled all-terrain vehicle overturned while he was attempting to climb a steep embankment. Oberg sued Honda in a jury trial and the jury returned a verdict of

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[1] *See e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (appropriateness of remedies); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (scope of § 1981); *Murphy v. Am. Motor Sales Corp.*, 570 F.2d 1226 (5th Cir. 1978) (punitive damages under ADEA); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (tolling of back pay liability under Title VII); *Rawson v. Sears, Roebuck & Co.*, 822 F.2d 908 (10th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) (size of jury award in state law claim); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991) (supporting employer's discharge of supervisor accused of sexual harassment); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992) (arguing for vacation of arbitrator's award which violated the public policy condemning sexual harassment).

$919,390.39 in compensatory damages and $5 million in punitive damages. The jury found Oberg 20 percent at fault, and the trial court reduced Oberg's compensatory award to $735,512.31.

Honda then filed motions for a new trial and for judgment notwithstanding the verdict contending, among other things, that the $5 million punitive judgment award was grossly excessive. The trial court denied Honda's motions without comment. The Oregon Court of Appeals affirmed the judgment of the trial court and Oregon's Supreme Court upheld the appeals court decision.

In Oregon, trial courts and appellate courts are limited in the type of post-trial review they may undertake for jury awards. In the case of punitive damages, for example, Oregon's trial and appellate courts only may review the sufficiency of the evidence and the appropriateness of the jury instructions. Oregon's statute governing evidentiary standards for punitive damages requires that "[e]xcept as otherwise specifically provided by law, a claim for punitive damages shall be established by clear and convincing evidence." Or. Rev. Stat. § 41.315 (1993).

Thus, when a jury returns a punitive damages award, the trial and appellate courts may review the punitive damages award to determine whether "clear and convincing evidence" that the defendant showed "wanton disregard for the health, safety and welfare of others" was present. Or. Rev. Stat. § 30.925 (1993). If a punitive damages award is not supported by clear and convincing evidence, the reviewing court may set aside the judgement.

If, however, a post-trial review does establish that there was clear and convincing evidence to support an award of punitive damages, the reviewing court may not review the award to determine if the punitive damages were excessive. Oregon's constitution prohibits such an inquiry.

Article VII (amended), section 3, of the Oregon Constitution states in relevant part:

> In actions at law, where the value in controvery shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

Oregon's Supreme Court interpreted this section to stand for the proposition that:

> [t]hey [the framers of Oregon's constitution] in effect declared their purpose to **eliminate,** as an incident of jury trials in this state, the **common law power** of a **trial court to re-examine the evidence and set aside a verdict because it was excessive** or in any other respect opposed to the weight of the evidence.

Van Lom v. Schneiderman, 187 Or. 89, 99, 210 P.2d 461 (1949) (emphasis added). Thus, in Oregon, trial courts and appellate courts may not review a jury award for excessiveness.

In the current case, the Oregon Court of Appeals and Supreme Court followed *Van Lom v. Schneiderman* and determined that Oregon's constitution did not violate due process. The Oregon Court of Appeals held that due process was not denied because the

> [p]ost-trial review evaluates the *admission* of evidence pertaining to punitive damages and the jury instructions given on that issue. The combined effect of the restrictions on jury discretion mandated by ORS 30.925 [2] and appellate review ensures that

[2] ORS 30.925(3) requires, among other things, that punitive damages be determined and awarded on the basis of the following:

> [t]he likelihood at the time that serious harm would arise from the defendant's misconduct; the degree of the defendant's awareness of that likelihood; the profitability of the defendant's misconduct; the duration of the misconduct and any

> the fact finder be guided by more than a defendant's financial condition and that there be a rational relationship between the amount of the award and what is necessary for deterrence. Pet. 87a (emphasis added).[3]

The Oregon Supreme Court upheld the appeals court decision. The Supreme Court stated,

> [w]e do not interpret *Haslip* [*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)] to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur." Pet. 25a.

SUMMARY OF ARGUMENT

As many Justices of this Court have observed, unrestrained jury discretion to award punitive damages presents a significant issue under the Due Process Clause. Lacking any guidance as to the appropriate monetary range within which to set an award, juries are left to wander blindly amid concepts of punishment and deterrence, groping in the dark for a suitable amount. Such standardless discretion offers a defendant no warning of its potential liability, and no Constitutional safeguards, even though punitive damages are "quasi-criminal" in nature. Further, the absence of any kind of post-trial review to determine whether punitive damage award was excessive further erodes the defendant's due process rights.

The court below failed to apply the standards developed by this Court in *Pacific Mutual*. In *Pacific Mutual*,

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> concealment of it; the attitude and conduct of the defendant upon discovery of the misconduct; the financial condition of the defendant; and the total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct. . . .

Id.

[3] Citations to the Petition for Certiorari are designated as Pet. —.

this Court approved of Alabama's process for awarding punitive damages and stated "[t]he Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Pacific Mut.*, 499 U.S. at 22. Further, the Court noted that Alabama's post-trial review accomplishes the following: (1) it determines whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct; (2) it examines the harm that actually has occurred from the defendant's conduct; (3) it discerns the degree of reprehensibility of the defendant's conduct; (4) it measures the profitability to the defendant of the conduct; and (5) it looks at the "financial position" of the defendant. *Id.* at 21-22.

Most recently, in *TXO Prod. Co. v. Alliance Resources Co.*, 113 S. Ct. 2711, 2727 (1993), Justice Scalia, in a concurring opinion, reaffirmed the importance of judicial review:

> Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages . . . So too, I think, with punitive damages: *judicial* assessment of their reasonableness is a federal right . . .

Thus, the courts below erroneously held that Oregon's prohibition of post-trial review for excessiveness did not violate due process. It is clear from this Court's holdings in *Pacific Mutual* and *TXO* that appellate review of punitive damages awards for excessiveness is a vital and necessary step for fulfilling due process requirements.

Standardless jury discretion to award punitive damages without adequate post-trial review is of substantial concern to employers. Punitive damages are available in employment-related claims under federal and state laws

such as 42 U.S.C. § 1981, state fair employment practices statutes, and various state tort laws that have been put to use in employment cases. Juries have awarded exorbitant sums as punitive damages in employment-related claims. In addition, pending legislation in Congress would lift the $300,000 cap on compensatory and punitive damages now available under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. As is shown by the instant case, employers in Oregon cannot rely on judicial authority to modify such awards.

Also, a more meaningful standard must be adopted *and included in jury instructions* in order to place proper limits on punitive damages awards. Juries, for example, should be instructed that punitive damages should be mitigated if the employer has adopted programs to prevent discrimination or established internal procedures to investigate and punish offenders. Further, a plaintiff's failure to utilize alternative avenues of relief also should be considered as mitigating punitive damages. These factors properly should be considered by an appellate court reviewing the propriety of a jury award.

Finally, in order to comport with due process requirements, post-trial and appellate review of the punitive damages awards must be meaningful. Thus, the post-trial review should determine not only whether there was sufficient evidence present to award punitive damages, but also that the jury relied on that evidence and awarded punitive damages with that evidence and the goal of deterrence and retribution in mind.

ARGUMENT

I. UNREVIEWABLE JURY DISCRETION TO AWARD COMPENSATORY AND PUNITIVE DAMAGES AND THE LACK OF JUDICIAL REVIEW OF THOSE AWARDS VIOLATES DUE PROCESS

The issue before the Court in this case is extremely important to private employers facing potential punitive damages awards in employment-related cases. EEAC's members share this Court's "concern about punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 18.

In the case at bar, the State of Oregon denied the petitioners its due process rights because Oregon's constitution, Article VII (amended), section 3, prohibits trial and appellate courts from setting aside a verdict on the grounds that it is excessive. Recently, Justice Scalia has noted the importance of judicial review for excessiveness when awarding punitive damages:

> Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages . . . So too, I think, with punitive damages: *judicial* assessment of their reasonableness is a federal right . . .

TXO Prod. Corp., 113 S. Ct. at 2727 (Scalia, J., concurring).

A. This and Other Courts Have Expressed Well-Founded Due Process Concerns Over Unrestrained Jury Discretion to Award Unlimited Punitive Damages

In *Pacific Mutual*, the Court summarized at length the reasons why unlimited jury discretion to award punitive damages may violate the Due Process Clause of the U.S. Constitution:

> This Court and individual Justices thereof on a number of occasions in recent years have expressed

> doubts about the constitutionality of certain punitive damages awards.

Pacific Mut., 499 U.S. at 9. This sentiment was echoed recently in *TXO Prod. Co. v. Alliance Resources Co.*, 113 S. Ct. at 2718: "[s]everal of our opinions have stated that the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.' "

Particularly well-stated was Justice Brennan's complaint in *Browning-Ferris* that:

> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important and potentially devastating decision.

Pacific Mut., 499 U.S. at 10 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989)). This unpredictability stems in part from the fact that:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

Pacific Mut., 499 U.S. at 12 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). While one could speculate about the motives of individual jurors, this Court should establish clear standards to carry out its earlier directive that governments "have no substantial interest in securing for plaintiffs . . . gratuitous awards of more damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349.

This Court also has stressed that:

> [T]he fact finder must be guided by more than the defendant's net worth. . . . [P]laintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Pacific Mut., 499 U.S. at 22. In this Court's follow-up decision to *Pacific Mutual*, the same concept was emphasized:

> We agree with TXO that the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident.

TXO Prod. Corp., 113 S. Ct. at 2723. As was pointed out in the labor relations context, there also is the danger that "punitive damages may be employed to punish unpopular defendants." *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979). As the Court stated in *Foust*:

> [S]ince juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger. . . .

Id. (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350).

B. As a First Step for Protecting Due Process Rights, Any Punitive Damages Standards That This Court Establishes Must Be Contained in the Actual Instructions Given to the Jury

The concerns expressed by this Court about excessive punitive damages have not made their way into the jury rooms where employment discrimination cases are considered. As shown below, in a growing number of instances, jury awards have gotten out of hand, with juries awarding multiple-millions of dollars to individual plaintiffs in single-incident discrimination cases. In these cases,

the amount of damages grossly exceeds proven compensatory damages.

As an appropriate first step to protecting due process, any punitive damages standards that are developed should be incorporated *as part of the jury instructions* in cases with potential punitive damages. The application of these standards should entail more than a legal duelling match between the trial and appellate courts. As Justice O'Connor has pointed out, appellate review is impossible where "juries are not told which factors are permissible and which are not." *Pacific Mut.*, 499 U.S. at 56 (O'Connor, J., dissenting).

Also, as is discussed below, the next step for protecting due process is to ensure that trial and appellate courts may review an award of punitive damages for excessiveness.

II. UNRESTRICTED COMPENSATORY AND PUNITIVE DAMAGES AWARDS THREATEN THE NATION'S EMPLOYMENT LAWS

A. The Threat of Unlimited Compensatory Damages for Pain and Suffering and Unlimited Punitive Damages Exists in Employment-Related Claims Under Federal and State Law

The issue presented here, whether due process is violated by Oregon's denial of judicial review of compensatory and punitive damages verdicts for excessiveness, is of substantial importance to employers throughout the United States. Employers can be, and have been, held liable for punitive damages for causes of action arising out of the employment relationship on a number of grounds. 42 U.S.C. § 1981 prohibits racial discrimination in all aspects of employment contracts, and punitive damages are available under that statute. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Also, some states have adopted "fair employment practices" laws that substantially parallel coverage

of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Of these, several provide expressly for punitive damages by statute. *See, e.g.*, New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 *et seq.*, as amended November 20, 1992. Others have been interpreted judicially to provide for punitive damages awards. *Grant v. Monsanto Co.*, 51 Fair Empl. Prac. Cas. (BNA) 1593 (S.D. Ohio, 1989) (compensatory and punitive damages available under Ohio Fair Employment Practice Law).[4]

In addition, many states allow employees to pursue common law causes of action in tort arising out of incidents in the workplace. For instance, in addition to Title VII liability, a sexual harassment claim can give rise to tort claims under state law for intentional infliction of emotional distress or even assault and battery, which in turn can lead to an award of punitive damages.[5] Also, the traditional doctrine of employment-at-will has been eroded significantly in recent years through judicially-created exceptions such as "tort claims of wrongful discharge in violation of public policy, contract based claims of wrongful discharge in violation of an employer's policies, and a new tort of abusive or wrongful discharge." I. Shepard, P. Heylman, and R. Duston, *Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge* 17 (1989). Punitive damages often are available under tort theories, and while

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[4] Although Oregon's Fair Employment Practice Act, Or. Rev. Stat. § 659.010 *et seq.* (1993), does not provide for punitive damages for discrimination in employment, it does provide compensatory damages for "emotional distress and/or impaired dignity." Or. Admin. R. 839-03-185(1) (1993).

[5] *See, e.g., Gilardi v. Schroeder*, 672 F. Supp. 1043 (N.D. Ill. 1986), *aff'd*, 833 F.2d 1226 (7th Cir. 1987) ($12,960.50 in back pay under Title VII and $50,000 in compensatory and $50,000 in punitive damages on state tort claims of battery and intentional infliction of emotional distress awarded to sexual harassment plaintiff).

contract claims do not usually support such a recovery, some states allow an award of punitive damages on a theory of "tortious or bad faith breach of contract." *Id.* at 212.

Moreover, the Civil Rights Act of 1991 amended Title VII and the Americans with Disabilities Act to allow juries to award compensatory and punitive damages for intentional discrimination. *See* 42 U.S.C. § 1981a. For punitive damages to be recovered, the respondent must have engaged in discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). But these amendments provide absolutely no guidance on how to measure the amount of punitive damages.[6]

Presently, the total of compensatory and punitive damages awardable under the ADA and Title VII to an individual plaintiff is capped at $300,000 for employers, such as EEAC's members, with more than 500 employees. 42 U.S.C. § 1981a(b)(3)(D). However, legislation has been introduced in the 103rd Congress that would remove the cap, thus allowing for unlimited damages. *See* H.R. 224, 103d Cong., 1st Sess. (1993) (*Rep. Kennelly Renews Push to Uncap Damages Under 1991 Civil Rights Law*, Daily Lab. Rep. (BNA), Jan. 6, 1993, at A-1), and S. 17, 103d Cong., 1st Sess. (1993) (Senate companion bill to H.R. 224 introduced by Senator Kennedy).

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[6] Likewise, the federal circuits have adopted for Section 1981 cases the standard or "reckless or callous disregard for plaintiff's rights, as well as intentional violations of federal law" set by this Court in *Smith v. Wade*, 461 U.S. 30, 51 (1983); *Stephens v. South Atl. Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir.), *cert. denied*, 484 U.S. 913 (1987). Like the Civil Rights Act of 1991, however, Section 1981 and these cases afford no guidance to a jury on assessing the size of an award.

Employers thus are exposed on several fronts to the possibility of unrestricted punitive damages awards. As is evident, recent jury punitive damages awards have been so outrageously out of proportion to the proven compensatory damages that it is likely that no principled standard has been applied. In Oregon this situation is critical because trial and appellate courts are prohibited by Oregon's constitution from reviewing the compensatory and punitive damages awards for excessiveness, thus eliminating any check on run away punitive damages awards.

B. Punitive Damages Awards in the Employment Context Are "Skyrocketing"

Punitive damage awards, particularly in the business context, are increasing by leaps and bounds. A 1987 RAND study, *Punitive Damages: Empirical Findings*, reported massive increases in the number and size of punitive damage awards in business/contract cases, including employment claims, between 1960 and 1984.[7]

Prior to this Court's *Pacific Mutual* decision, awards in the employment field were staggering. A jury in Texas awarded $31,000,000 (reduced to approximately $21,000,000) to an accountant who claimed that his former employer wrongfully fired him after he refused to sign what he believed were fraudulent tax returns. *Sims v. Kaneb Servs., Inc.*, No. 8602474 (Harris County Texas Dist. Ct.) (settled during pendency of motion for new trial.) A former Lockheed auditor was awarded $15,000,000 by a Los Angeles County jury after he alleged he was wrongfully terminated after complaining that the metal used to construct transport planes was defective. *Beneck, Schielke, Jones, Jr. v. Lockheed Corp.*, Case No. C 621967 (Cal. Super. Ct. November 1990).

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[7] M. Peterson, S. Sarma, M. Shanley, *Punitive Damages: Empirical Findings* at vi (1987). *See also Pacific Mut.*, 499 U.S. at 61 (O'Connor, J., dissenting).

If anything, the problem has gotten worse since the *Pacific Mutual* decision was handed down. For example, in Texas, a state court jury awarded $124 million to a Triton employee who claimed that he was wrongfully terminated.[8] Texaco appealed a state court jury award of $20.3 million to a former executive in a sex discrimination case in California.[9] A Dallas jury in April 1993 awarded $15.5 million in actual and punitive damages to an employee erroneously accused of stealing company property.[10] The Texas Supreme Court let stand an award of $13.5 million in actual and exemplary damages to a whistleblower who alleged that the state agency he worked for fired him for reporting wrongdoing.[11] Also in Texas, a state court awarded a 45-year-old roustabout $10,000,000 in damages for injuries he suffered on the job last March.[12] A tree trimmer in South Carolina was awarded $3 million in compensatory and punitive damages when he suffered a laceration to the neck while on the job.[13] Likewise, an Oregon jury awarded $6.2 million to a former executive alleging wrongful termination;[14] $3.9 million was awarded to a former employee of Hughes Aircraft Co. who alleged that he was fired because he

[8] *Janacek v. Triton Energy Corp.*, No. 90-07220-M (Texas Dist. Ct. May 22, 1992).

[9] *Martin v. Texaco Ref. and Mktg. Inc.*, No. C614044 (Cal. Super. Ct. July 17, 1992).

[10] *Hagler v. Procter & Gamble Mfg. Co.*, Case No. 91-5250-E (Texas Dist. Ct. April 23, 1993).

[11] *Texas Dep't of Human Services v. Green*, Case No. D-3986 (Texas S. Ct. February 2, 1994).

[12] *Cockerham v. Diamond M. Co., Diamond M. Hunter Co., Diamond M. Deep Seas Ltd., Kaneb Services, Ltd., and Callais Marine Service, Inc.*, Case No. 65,405 (Texas Dist. Ct. March 1993).

[13] *Land v. Utility Supply and Equipment Co.*, Case No. 91-CP-26-0790 (South Carolina Common Pleas Ct. September 1992).

[14] *Banaitas v. Mitsubishi Bank Ltd.*, No. 89-12-07357 (Or. Cir. Ct. March 19, 1991).

was black;[15] a Michigan jury awarded $1 million to a former salesman for General Electric Co. who claimed that his discharge during a reduction-in-force violated oral assurances of job security that he had received during his interview;[16] and a California jury awarded almost a million dollars to a former employee who alleged breach of contract and intentional infliction of emotional distress due to a negative reference given to a potential employer.[17]

Furthermore, studies indicate that plaintiffs who risk seeing litigation through to the end of a jury trial will find that juries are more likely to announce a plaintiff's verdict than a verdict in favor of employers. For example, the Institute for Civil Justice, part of RAND Corporation's domestic research division, found that plaintiffs were victorious 70 percent of the time in employment cases ending in a jury trial.[18] Orrick, Herrington & Sutcliffe found almost the same result—in a study of all state and federal California courts, juries found in favor of the plaintiff in 61.48 percent of the cases.[19] These studies demonstrate that jury trials are more receptive to plaintiffs than to employers.

The likelihood that they will win before a jury and the possibility of receiving an exorbitant monetary award strongly encourages plaintiffs and plaintiffs' attorneys to

[15] *Harris v. Hughes Aircraft Co.*, No. 010988 (Cal. Super. Ct. June 4, 1991).

[16] *Pietsch v. General Elec. Co.*, No. 89-906227-CZ (Mich. Cir. Ct. April 2, 1991).

[17] *Holton v. Lockheed Corp.*, No. 642082 (Cal. Super. Ct. January 28, 1991).

[18] Detouzos, James N. and Lynn A. Karoly, *Labor Market Responses to Employer Liability*, Institute for Civil Justice, April 5, 1992. The researchers concentrated their study on California juries.

[19] Orrick, Herrington & Sutcliffe, *Employment Law Verdicts*, Labor and Employment Department, June 24, 1992.

proceed to litigation. With such an enormous pay day looming at the end of litigation, plaintiffs and their attorneys may find little reason to explore alternative avenues of resolution, particularly if there is no appellate review of such awards. Fewer and fewer employment cases may settle before trial, thus adding to the burgeoning caseload of federal dockets.

Moreover, in many instances, awards like those cited above clearly will bear "no . . . relation to the actual harm caused," *Gertz*, 418 U.S. at 350, and are "be[ing] employed to punish unpopular defendants." *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979). In each of these cases, the only rational explanation for the massive award is that the jury sought to punish a large employer by granting the plaintiff a windfall far in excess of actual damages.

Federal courts generally have discretion to set aside an excessive jury verdict and order a new trial, or order remittitur of a portion of the verdict that it finds to be excessive. *See generally* 6A Moore's Federal Practice § 59.08[6] (2d Ed. 1989).[20] Similar procedures are available in most states. *See, e.g.*, Ill. Rev. Stat. Ch. 110, Para. 2-1207 (1988) (granting trial court statutory authority to order remittitur and conditional new trial

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[20] *See also Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (upholding lower court's grant of judgment notwithstanding the verdict and in the alternative for a new trial on grounds, *inter alia*, that a jury award of $2,500,000 in claims under 42 U.S.C. § 1981 was excessive) on remand, 672 F. Supp. 1408 (M.D.Fla. 1987), reversed 983 F.2d 1573 (11th Cir. 1993) (reversing second jury verdict on other grounds); *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1314 (7th Cir. 1985) (granting new trial on issue of punitive damages in employment discrimination action under 42 U.S.C. § 1981 unless plaintiff agrees to remittitur from $150,000 to $20,000); *Rogers v. Fisher Body Div., G.M.C.*, 739 F.2d 1102, 1109 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (reversing and remanding $500,000 punitive damages award under 42 U.S.C. § 1981 for new trial).

in case of excessive jury award of punitive damages). Oregon's courts, however, are prohibited from setting aside an excessive jury verdict or ordering remittitur of a verdict, thus setting the stage for exorbitant jury verdicts without the benefit of meaningful judicial review.

C. The Absence of Reasonable Restrictions on Punitive Damages Awards Frustrates the Remedial and Conciliatory Policies Inherent in Federal Labor and Employment Law

Unrestricted punitive damages awards are particularly inappropriate because of the unique nature of employment disputes. Unlike typical tort and contract claims, employment controversies do not take place between strangers. The plaintiff and defendant in an automobile accident case generally never met before they collided. The parties to an ordinary breach of contract claim have no ties other than the contract itself. In contrast, most labor and employment disputes involve individuals and companies with ongoing relationships that began before the dissension and are expected to continue after the parties' differences are resolved. *Cf. Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. at 51-52 (". . . the threat of punitive damages could disrupt the responsible decision making essential to peaceful labor relations.").

Even though punitive damages were added by the Civil Rights Act of 1991, Title VII retains the provisions that require and encourage conciliation and resolution rather than litigation.

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those practices and devices that discrimination on the basis of race, color, religion, sex, or national origin. . . . *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.* To this end, Congress created the Equal Employment

> Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation and persuasion before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added).

The availability of unrestricted punitive damages would seriously hamper these conciliation efforts. Federal judges, who are ideally situated to observe the effects of different remedial schemes on the volume of litigation and the willingness of the parties before them to settle, have found general damages awards to be a serious impediment to conciliation and settlement in employment litigation.[21]

[21] The potential effect on the conciliation process of the availability of an unquantified damages remedy was best expressed by courts that wrestled in the late 1970's and early 1980's with the issue of whether compensatory damages could be recovered under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, which authorizes the award of both "legal" and "equitable" relief. These courts agreed that the hope of such awards would "severely cripple the mediation process." *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036 n.8 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). *See Rogers v Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978) ("Haggling over an appropriate sum could become a three-sided conflict among the employer, the [EEOC], and the claimant."); *Dean, supra* at 1039 ("The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving [EEOC], employee and employer which might well be calculated to frustrate rather than to 'effectuate the purposes' of the Act."); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984) ("If an individual alleging discrimination knew he could recover compensatory damages if he refused to settle during the administrative process and commenced a civil suit, he would have little incentive to resolve the dispute during the conciliation process."); *Sant v. Mack Trucks, Inc.*, 424 F. Supp. 621 (N.D. Cal. 1976) ("If large tort recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries.").

As these judges have observed, the hope of a "big ticket" damages award at trial is a major disincentive to resolution of cases without litigation.

Even though unlimited punitive damages are not now available under Title VII and the Americans with Disabilities Act, the Age Discrimination in Employment Act[22] (ADEA) and other federal labor employment statutes, plaintiffs frequently add pendent state claims to discrimination complaints under federal law. *Cf. United Mine Workers of Am. v. Gibbs*, 383 U.S. 720 (1966) (doctrine of pendent jurisdiction). These state law claims often afford a punitive damages remedy where federal law does not. The possibility of an unrestricted punitive damages award under state law thus has the same deleterious effect on conciliation efforts as would the availability of such an award under the federal statute itself.

[22] The ADEA does provide for "liquidated damages" in cases of "willful" violations, but these damages are strictly limited to an amount equal to the "unpaid compensation." 29 U.S.C. § 626(b). Moreover, a "willful" violation occurs only when an employer acts with "knowing or reckless disregard for whether or not the challenged conduct violated the Act." *Trans World Airlines v. Thurston, Inc.*, 469 U.S. 111, 128 (1985).

III. MEANINGFUL JUDICIAL REVIEW OF COMPENSATORY AND PUNITIVE DAMAGES AWARDS IS NECESSARY TO FULFILL DUE PROCESS REQUIREMENTS

A. In Order to Comply With Due Process When Awarding Compensatory and Punitive Damages, Both the Trial Court and the Appellate Courts Must Have the Authority to Review Jury Awards to Ensure that the Awards Are Based on the Evidence Presented at Trial and Are Free of Bias, Passion, or Prejudice

The courts below concluded that Oregon's constitution prohibits trial and appellate courts from reviewing compensatory and punitive jury verdicts for excessiveness. Further, Oregon's constitution does not allow a reviewing court to discern whether the jury's award is based on the evidence presented at trial or is motivated by bias, passion, or prejudice. Thus, a reviewing court in Oregon is not permitted to determine: (1) whether the award is excessive; (2) whether the jury actually relied and adhered to the evidence presented at trial and made an appropriate award based on that evidence or (3) whether the jury made an appropriate decision to award punitive damages based on the evidence and the trial court's instructions, but awarded the plaintiff an excessive amount because it relied on impermissible considerations such as the race, ethnic origin, or religion of the parties when determining the amount of the award.[23]

This Court and others have indicated that meaningful appellate review is necessary to ensure that due process requirements are fulfilled. In *Pacific Mutual*, for example, this Court approved of Alabama's punitive damages proc-

[23] For example, the jury could assess a large punitive damages award against a defendant corporation because the corporation was closely identified with a particular religious group that the jurors were openly hostile to, even though that was never an issue at trial.

ess because Alabama provided a three step process for reviewing a punitive damages award.[24] This Court concluded that the process satisfied due process requirements because (1) the jury was adequately instructed that its discretion to award punitive damages was confined to satisfying the goals of deterrence and retribution; (2) the post-trial procedures for scrutinizing punitive awards ensured "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages";[25] and (3) the review of punitive damages awards by the Alabama Supreme Court provided an additional check on the jury's discretion. *Pacific Mut.*, 499 U.S. at 19-21. This Court concluded, "[t]he application of these standards . . . imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." *Id.* at 22.

Recently, the Third Circuit, relying on the *Pacific Mutual* factors, also determined that a post-trial review of a jury verdict is a crucial feature when discerning whether due process requirements have been satisfied.

> [T]he *scope* of both trial court and appellate review were significant features in the Court's approval of the *Haslip* jury's punitive damage award, and thus we consider those applicable here.

[24] The Alabama process includes instructing the jury; performing a post-trial review to ensure that the jury's award was appropriate; and reviewing the trial court's approval or remittitur of the punitive damages award.

[25] In *Hammond v. Gadsden*, 493 So. 2d 1374 (1986), the Alabama Supreme Court developed standards for the appellate courts to use when reviewing for jury bias, passion, or prejudice:

> Among the factors deemed 'appropriate for the trial court's consideration' are the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'impact upon the parties,' and 'other factors, such as the impact on innocent third parties.'

Pacific Mut., 111 S. Ct. at 1044 (quoting *Hammond v. Gadsden*, 493 So. 2d 1374, 1379 (1986)).

Dunn v. Hovic, 1 F.3d 1371, 1381 (3rd Cir. 1993) (emphasis added). Based on these factors, the Third Circuit approved of the district court's decision to remit a portion of the punitive damage award. The Third Circuit noted that the district court had considered the defendant's net worth, the relationship between the compensatory award and its remitted punitive damages award, and the size of similar awards in other cases when deciding to reduce the initial jury verdict award. The Third Circuit stated, "[t]hese factors considered in post-trial review were approvingly referred to in *Haslip*, and serve as an effective counterpoint to the wide discretion given the jury." *Dunn*, 1 F.3d at 1382.

Thus, the Third Circuit in *Dunn* recognized that juries may be inclined to award punitive damages that are excessive and that a post-trial review of the proper "scope" provides an opportunity to correct the jury's errors and ensure that due process requirements are fulfilled. Post-trial review in Oregon does not permit such an inquiry, much less an inquiry of a constitutionally adequate "scope."

Similarly, the Ninth Circuit also relied on *Pacific Mutual's* three step process for ensuring due process in the award of punitive damages. In *Morgan v. Woessner*, 997 F.2d 1244, 1257-58 (9th Cir. 1993), the court emphasized the following: (1) the importance of properly instructing the jury; (2) the necessity for the trial court to review the punitive damages award and record its reasons for upholding or altering the award; and (3) the importance of appellate review to ensure that the trial court properly instructed the jury, recorded its reasons for upholding or altering the award, and awarded the amount necessary to accomplish the goals of punishment and deterrence.

Thus, the Ninth Circuit did not merely examine the jury award to determine whether there was sufficient evidence to allow a punitive damages award, the court held that

due process requires the court to examine the jury's award to ensure that it was based on the appropriate evidence and accomplished the goals of punishment and deterrence.

B. Employer Efforts to Prevent Discrimination Should Bar or Mitigate Punitive Damages, and Juries and Reviewing Courts Should Be Required to Recognize Such Factors

1. *The Jury and Reviewing Courts Should Consider Favorably Employer Programs Designed to Prevent Discrimination*

This Court previously has held, in the sexual harassment context, that employers cannot always be held strictly liable for the actions of supervisors. *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). This rule is equally, if not more, relevant to liability for punitive damages. As Chief Justice Rehnquist has observed, punitive damages often are rationalized as punishment, as deterrence, and as a "bounty" to encourage litigation. *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). Where an employer, however, has made substantial efforts to prevent the harm complained of, none of these purposes is served by a punitive damages award against that employer. Thus, standards are necessary to establish when, if ever, an employer may be liable for punitive damages based upon the doctrine of *respondent superior*.[26]

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[26] An example of such mitigating factors can be found in the 1991 amendments to the New York City Human Rights Law, Chapter 5, 38-107, 13(d)(1). As mitigating factors for the amount of civil penalties, the Commission can consider whether the employer:

> (1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:
>
> > (i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees,

The sexual harassment context provides a particularly appropriate model for examination. Sexual harassment in the workplace can occur in two circumstances: "quid pro quo," where the offender is in a position of authority and ties acceptance of sexual advances to advancement or other economic benefits, and "hostile environment," where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting EEOC guidelines on sexual harassment, 29 C.F.R. § 1604.11(a)(3)). *See also Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370-71 (1993).

In *Vinson* the Court suggested mitigation factors such as (1) the existence of a specific policy prohibiting sexual harassment; (2) whether the policy is communicated to employees in a manner that encourages them to report harassing behavior; (3) whether and when the employer learned of the misconduct; and (4) if the employer's response was adequate. *Vinson*, 477 U.S. at 72-75. Accordingly, federal courts since *Vinson* have based their decisions on these factors.[27] Thus, if an employer can

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agents and persons employed as independent contractors, and for taking appropriate action against those persons who are found to have engaged in such practices;

(ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;

(iii) A program to education employees and agents about unlawful discriminatory practices under local, state and federal law; and

(iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices . . . .

[27] *See, e.g., Saxton v. AT&T*, 63 Fair Empl. Prac. Cas. (BNA) 625 (7th Cir. 1993) (employer not liable for "hostile environment" of sexual harassment under Title VII when it took prompt and appropriate remedial action and further, Title VII only requires

demonstrate that it made a substantial effort to prevent the existence of a "hostile environment" it may be insulated from liability.

It does not follow, however, that a jury also should be able to award unreversible punitive damages under all circumstances. Punitive damages are intended to punish wrongdoers and deter future unlawful conduct. If an employer has devoted substantial effort to implementing an anti-harassment policy but was unable to prevent the disobedience of an errant employee, it would serve no purpose to punish the employer. Thus, in cases where punitive damages are available, the employer's efforts should be considered as negating, or at least mitigating against, such an award. At the very least, the charge to the jury should direct the jury to take the employer's efforts into account. Such efforts, moreover, should be taken into consideration during meaningful judicial review.

For example, evidence that the employer has established a strong policy forbidding sexual harassment, has communicated that policy to supervisors and rank-and-file alike, and has indicated its intent to punish those who disobey, should be relevant to show that the company does not condone harassment. Thus, such evidence should

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that the employer take steps reasonably likely to stop the harassment); *Nash v. Electrospace System*, 9 F.3d 401 (5th Cir. 1993) (the company's prompt remedial action provided a defense to Title VII liability); *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for "hostile environment" sexual harassment under Title VII when it took immediate action, including investigation and discipline, upon receipt of complaint); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984) (same); *Kauffman v. Allied Signal*, 970 F.2d 178 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992) (same); *Scherer v. Rockwell Int'l Corp.*, 975 F.2d 356 (7th Cir. 1992). *But compare Karibian v. Columbia University*, 63 Fair Empl. Prac. Cas. (BNA) 1038 (2d Cir. 1994) (employer is strictly liable for the *quid pro quo* harassment of a supervisor and for the harassing environment created by the supervisor.)

distinguish and separate the company's liability from that of an individual supervisor or employee who in effect has engaged in unauthorized, willful misconduct. Indeed, imposing punitive damages against the employer in this situation would be nothing more than improperly dipping into an innocent "deep pocket." Only judicial review can ensure that inappropriate punishment does not occur.

2. *A Victim's Failure to Use the Employer's Internal Grievance Procedure Should Mitigate Against Punitive Damages*

Likewise relevant is evidence that the company's policy encouraged employees to report incidents of discrimination or harassment, including methods to bypass the direct supervisor if that person is also the harasser. An employee's failure to come forward to take advantage of the anti-harassment policy must then negate or mitigate against a punitive damages award. The plaintiff's refusal to make use of an available recourse that could have effectively remedied the situation must be taken into consideration in mitigation of a punitive damages award.

In addition, where the affected employee does not make use of an anti-harassment policy and the employer has no reason to know that harassing behavior is occurring, the employer's lack of knowledge also must be considered a mitigating factor. In this situation, punitive damages are particularly inappropriate. Without actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect itself from actions contrary to company policy, even if it has a comprehensive anti-harassment policy. Punitive damages would serve no purpose, since there is no employer conduct to be deplored and deterred.

3. *An Employer's Attempt to Investigate and Remedy Misconduct Should Mitigate Punitive Damages*

Finally, the conduct of an employer who *is* informed of harassing behavior is extremely relevant to mitigation of any punitive damages award. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and bona fide investigation, reached a rational conclusion and took appropriate action, should be credited for those efforts. Indeed, the EEOC has strongly supported such actions. The agency's Guidelines take the position that employers who take "immediate and appropriate" corrective action are not liable for the acts of co-employees. 29 C.F.R. § 1604.11(d).

It also could be argued that an employer who conducts a complete investigation and reaches a well-supported, reasonable judgment that sexual harassment has not occurred, and thus takes no action against the accused employee, should receive credit for its good faith efforts even if a trier of fact later disagrees with its conclusion.

"Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Thus, as the purpose of punitive damages is to punish a wrongdoer and deter future unlawful conduct, it stands to reason that such awards should be severely limited, if not forbidden, when an employer made a good faith effort to prevent the unlawful conduct but its effort was unavailing. Accordingly, this Court should reject any *per se* rule that would allow a jury unrestricted discretion to award punitive damages solely on the basis of *respondent superior*. Instead, if the Court finds that such awards are appropriate under any circumstances, it should adopt reasonable standards, including taking into account employer efforts to prevent unlawful behavior by

subordinates as mitigating factors.[28] EEAC's members are extremely concerned that these relevant factors would not be given sufficient consideration if jury awards were not reviewable by the trial or appellate courts.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decision of the Supreme Court of Oregon be reversed.

Respectfully submitted,

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[28] Another favorable approach to controlling punitive damages was suggested by Justice O'Connor in *Pacific Mut.*, 111 S. Ct. at 1064. The trial could be *bifurcated* into liability and punitive damages stages. This approach makes it easier to impress upon the jury that a higher degree of evidence is necessary to support punitive damages awards.